91-429

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In Re GEORGE R. WESTFALL,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

A state supreme court disciplined a lawyer/prosecutor under its ethics rules for publicly criticizing an appellate court opinion in a case prosecuted by his office. The criticism, which the supreme court viewed as reflecting adversely on the authoring judge, was that the opinion was wrong, result-oriented, rested on reasons that the lawyer thought "somewhat illogical" and "even a little bit less than honest," and "distorted" the applicable statute.

The questions presented are:

1. Whether the First Amendment bars a State from disciplining a lawyer for publicly criticizing a judge, where the lawyer's criticism does not contain false statements of fact made with "actual malice" within the meaning of *New York Times Co. v. Sullivan,* and the criticism could not have prejudiced any adjudicative proceeding.

2. Whether the First Amendment precludes a State from disciplining a lawyer for criticizing a judicial opinion because such criticism does not state actual facts about an individual which are provable as false.

PARTIES BELOW

The Advisory Committee of the Missouri Bar initiated this case in the Missouri Supreme Court as an original disciplinary action by filing an information. The matter was prosecuted in the court below by the Missouri Bar Administration.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court (App. 1) is reported at 808 S.W.2d 829. The report of the special master appointed by the Missouri Supreme Court is reproduced at App. 42.

JURISDICTION

The Missouri Supreme Court entered its judgment on May 3, 1991. App. 102. Petitioner timely filed a motion for rehearing on May 20, 1991, pursuant to Missouri Supreme Court Rule 84.17, which the Missouri Supreme Court denied on June 11, 1991. App. 103. This Court has jurisdiction to issue the writ of *certiorari* under 28 U.S.C. § 1257 because petitioner raised and preserved, and the highest court of the state specifically rejected, a federal constitutional claim.

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

United States Constitution

Amendment I.

Congress shall make no law . . . abridging the freedom of speech . . . .

Amendment XIV, Section 1.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Missouri Supreme Court Rule 4, Rules of Professional Conduct

Rule 8.2

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

. . . . .

Rule 8.4

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

. . . . .

(d) engage in conduct that is prejudicial to the administration of justice; . . .

STATEMENT OF THE CASE

Petitioner, George R. Westfall, is a lawyer and, when this case arose, was the elected prosecuting attorney of St. Louis County, Missouri.[1] The Missouri Supreme Court, over the dissent of then Chief Justice, now Judge, Charles B. Blackmar, found Westfall guilty of professional misconduct and reprimanded him for publicly criticizing an appellate court opinion in a widely-publicized case prosecuted by his office. Westfall's comments referred to the authoring judge by name, and were to the effect that the opinion was wrong, result-oriented, rested on reasons that Westfall thought "somewhat illogical" and "even a little bit less than honest," and "distorted" the applicable statute.

1. This case arises out of the prosecution of Dennis Bulloch for crimes committed in connection with the death of his wife, Julia Bulloch. In May, 1986, Julia Bulloch's bound and gagged nude body was found in the burning ruins of her home. Police investigators determined that she had died not from the fire but of suffocation caused by cloth jammed into her mouth and held in place by adhesive tape. Dennis Bulloch was indicted for first degree murder and arson. App. 44. Believing that the case involved murder for financial gain, the prosecution elected to seek the death penalty. Mast. Tr. 26-28.[2]

A trial pertaining only to the charge of first degree murder commenced in May, 1987. Westfall did not personally handle any aspect of the trial; the prosecution was conducted by an attorney in Westfall's office. At trial, Bulloch admitted starting the fire, but asserted that his wife's death had been an accident that occurred during a night of consensual sexual bondage. He

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[1] Westfall was elected County Executive of St. Louis County in November, 1990, and assumed that post on January 1, 1991.

[2] "Mast. Tr." refers to the transcript of the hearing in this case held before the special master on February 23, 1990.

claimed that he panicked after the accident and started the fire to cover up her death. The jury convicted Bulloch only of the lesser included offense of involuntary manslaughter, and he was sentenced to seven years' imprisonment. App. 44. The verdict generated considerable public protest from individuals who believed that Bulloch should have been convicted of first degree murder. Ex. 6.[3]

In July, 1987, the grand jury indicted Bulloch on additional charges of armed criminal action, under R.S. Mo. § 571.015, and tampering with physical evidence. Bulloch sought a writ of prohibition from the Missouri Court of Appeals, asserting that prosecuting him for armed criminal action would unconstitutionally subject him to double jeopardy. The court of appeals entered a provisional writ, and, on August 9, 1988, issued an opinion making the writ permanent, thereby barring the prosecution from going forward. The opinion, signed by Judge Kent E. Karohl on behalf of a three-judge panel, held that a subsequent trial of Bulloch for armed criminal action would constitute double jeopardy.[4] App. 2.

Upon learning of the court of appeals' August 9, 1988, decision, Westfall concluded that it was erroneous as a matter of law. In his view, the Missouri legislature intended that the armed criminal action statute would be available in capital mur-

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[3] "Ex." refers to the exhibits admitted into evidence at the hearing of February 23, 1990 before the special master.

[4] The Missouri Supreme Court upheld the court of appeals' decision. *State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo. banc 1989), *cert. denied*, 110 S. Ct. 718 (1990). Bulloch subsequently was tried and convicted for second degree arson and tampering with physical evidence, and sentenced to seven years' imprisonment for arson and a consecutive five year term for tampering (the maximum prison terms allowable).

der cases. Yet, while another Missouri statute, R.S. Mo. § 565.004.4, seemed to provide that an armed criminal action charge could not be tried in the same trial as a capital murder charge, the court of appeals now had held that an armed criminal action charge could not be tried in a separate trial. Westfall viewed the court of appeals' decision as forcing prosecutors to choose between pursuing the death penalty or armed criminal action, but not both, and as thereby thwarting the legislature's intent. Mast. Tr. 28-29, 54-55; Comm. Tr. 80-81.[5]

Westfall's views on the court of appeals' decision were influenced by the Missouri appellate courts' history, during the early 1980s, of vacating armed criminal action convictions on double jeopardy grounds, which is chronicled in *Missouri v. Hunter*, 459 U.S. 359 (1983), and *State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo.banc 1989), *cert. denied*, 110 S.Ct. 718 (1990). That history, which Missouri Supreme Court Judge Albert L. Rendlen has characterized as "the strange history of [the Missouri Supreme Court's] failure to follow [*Whalen v. United States*, 445 U.S. 684 (1980)] and [*Albernaz v. United States*, 450 U.S. 333 (1981)]" *(Seier*, 771 S.W.2d at 74), can be viewed as evidencing hostility on the part of the Missouri courts towards armed criminal action charges. When the court of appeals issued its August 9, 1988 decision, Westfall feared that the Missouri courts' historical dislike of the armed criminal action statute was again rearing its head. Mast. Tr. 34, 50-52; Comm. Tr. 61-66, 74-75.[6]

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[5] "Comm. Tr." refers to the transcript of the hearing held by the Advisory Committee on June 1, 1989.

[6] Of course, the dispositive issue in this case is not whether the court of appeals' issuance of the writ of prohibition was right or wrong, but whether Westfall had a right to express his views without being subjected to professional discipline for doing so.

The day of the court of appeals decision, a local television station sought out Westfall and interviewed him concerning his views on the decision. Mast. Tr. 29. The interview was videotaped and portions of it were broadcast later that day on the evening news. Westfall's comments, as broadcast, included the following (App. 3):

> . . . The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.
>
> . . . .
>
> . . . but for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.
>
> . . . .
>
> The decision today will have a negative impact on all murder one cases pending in Missouri, in the future in Missouri, and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.
>
> . . . .
>
> But if it's murder first degree and we're asking for death, which, of course, is the most serious of all crimes, Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

2. On January 31, 1989, as a result of Westfall's remarks, the Advisory Committee of the Missouri Bar charged Westfall with professional misconduct in violation of Rules 8.2(a) and

8.4(a) and (d) of the Missouri Rules of Professional Conduct, Missouri Supreme Court Rule 4.[7] The charge focused exclusively on Westfall's televised statements regarding Judge Karohl's opinion for the appellate court. Following a hearing, the Advisory Committee found probable cause to believe that Westfall was guilty of the misconduct charged, but concluded that the matter could be adequately addressed by a private written admonition. The Committee proposed that the matter be resolved on that basis but Westfall exercised his right to reject the admonition. The Committee then filed an information with the Missouri Supreme Court, triggering a formal original disciplinary proceeding in that court. App. 1, 3-4, 37-39. *See* Missouri Supreme Court Rule 5.13.

3. The Missouri Supreme Court appointed a special master who heard further testimony and rendered a report. App. 42. The special master concluded that Westfall had violated Rules 8.2 and 8.4. App. 73-74, 95-98. He found that the statements made by Westfall which were broadcast on television (1) "certainly convey to the average television viewer, and to a lawyer viewer that the judge has done something wrong" (App. 59); (2) "certainly imply an intentional violation of the Supremacy Clause and the above canons [Code of Judicial Conduct] for 'dishonest reasons [and] . . . thus imply a lack of integrity and misconduct" (App. 60); and (3) leave "the ordinary viewer . . . to infer that the dishonest reasons may have involved bribery, coercion, or intimidation, or some personal connection between the judge and some party in the case" (App. 61). The special master stated that "[e]ven if this was not the meaning that [Westfall] intended

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[7] Rules 8.2(a) and 8.4(a) and (d), quoted at the outset of this petition, are drawn verbatim from the American Bar Association Model Rules of Professional Conduct.

to convey," that was no defense because he "assumes the risk of being misunderstood by the ordinary hearer of his publications." *Id.*[8]

The special master rejected Westfall's First Amendment defense. App. 74, 97-98. He concluded that Westfall's own subsequent testimony that he had not intended to impugn the personal integrity of the judge, whom he believed to be a "fine judge," showed both that Westfall's statements were false and that he knew the statements to be false. App. 65-66. The special master recommended that Westfall be suspended from the practice of law for one year, but that the order of suspension be stayed in favor of a public reprimand and one year's probation on the conditions that Westfall obey the disciplinary rules and publicly apologize to Judge Karohl. App. 101.

4. The Missouri Supreme Court reviewed the special master's report *de novo* and agreed that Westfall had violated Rule 8.2(a) of the Missouri Rules of Professional Conduct. App. 1-7. The court also concluded that Westfall had violated Rule 8.4 because "[t]he charges brought under Rule 8.4 are encompassed within the violation of Rule 8.2(a) in this case and, for purposes of imposition of discipline, cannot be distinguished." App. 18. The court publicly reprimanded Westfall and ordered him to pay the costs of the proceedings. *Id.*

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[8] Although the original Advisory Committee charge and ensuing information focused exclusively on Westfall's televised statements regarding Judge Karohl's opinion for the appellate court and on Rules 8.2 and 8.4, the special master also addressed other public statements that Westfall had made concerning the jury verdict in the Bulloch case and the disciplinary proceedings against him. App. 84-90, 93-97. The Missouri Supreme Court, however, specifically declined to consider those further charges, confining itself "only [to] those charges contained in the original information." App. 4. Accordingly, none of those other allegations and charges is before this Court.

The court also rejected Westfall's First Amendment defense. App. 7-17. It acknowledged that for professional discipline based on criticism of a judge to pass constitutional muster, the criticism must have consisted of false statements made with "actual malice," *i.e.*, knowledge or reckless disregard of their falsity. App. 13. As to the test for reckless disregard, however, the court declined to apply the subjective standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which requires a determination that the speaker "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or had a "high degree of awareness of [his statement's] probable falsity," *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964). The court held, instead, that the proper test for reckless disregard in professional disciplinary proceedings is "an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." App. 14-15, citing *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn.), *reinstatement granted sub nom. In re Reinstatement of Graham*, 459 N.W.2d 706 (Minn.), *cert. denied sub nom. Graham v. Wernz*, 111 S.Ct. 67 (1990).

The court acknowledged that "[i]n defamation actions the standard has consistently been a subjective one," but concluded that "[t]he objective standard survives first amendment scrutiny in light of the compelling state interests served" by professional disciplinary rules governing the practice of law. App. 13-15. Applying the objective standard, the court concluded that Westfall acted with reckless disregard because, before making his comments, he "failed to investigate to determine whether Judge Karohl had participated in any cases involving the armed criminal action issue, authored any opinions on the subject, or expressed any personal opinions about it." App. 16.

5. Chief Justice Blackmar dissented on constitutional and other grounds. App. 21. He concluded that the holding and rationale of *New York Times Co. v. Sullivan* fully apply in lawyer disciplinary proceedings directed at criticism of judges outside of courtroom proceedings. He noted that the basis of the majority's finding of recklessness — Westfall's "failure to think things through or to study the case law" — does not meet the standard for recklessness set forth in this Court's decisions in *St. Amant* and *Garrison*. App. 35. The dissent further faulted the majority for using Westfall's testimony "that he did not mean to impugn the integrity of Judge Karohl, and that he did not believe . . . that the judge was not honest" "as indication that [Westfall] acted 'with reckless disregard as to the truth or falsity of the statements.'" App. 34. Chief Justice Blackmar stated that "[i]n assigning an unwarranted construction to Rule 8.2, the Court commits the classic First Amendment sin of overbreadth." App. 36.

REASONS FOR GRANTING THE PETITION

The decision of the Missouri Supreme Court is wrong, inconsistent with decisions of this Court, and conflicts with decisions of other state supreme courts. Like *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991), this case presents an important federal constitutional issue regarding the application of the First Amendment to lawyer disciplinary proceedings which warrants this Court's review. Moreover, because this case raises legal issues distinct from those addressed in *Gentile*, this Court's plenary review is appropriate now, without first asking the Missouri Supreme Court to reconsider its ruling in light of this Court's intervening decision in *Gentile*.[9]

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[9] Alternatively, the Court should grant the petition, vacate the judgment below, and remand for the Missouri Supreme Court's reconsideration in light of *Gentile*.

1. This Case Presents an Important, Unresolved and Frequently Recurring First Amendment Issue on Which State Supreme Court Decisions Conflict.

This case raises the issue of whether the "actual malice" test articulated by this Court in *New York Times Co. v. Sullivan* — particularly the "reckless disregard" component of that test — applies in disciplinary proceedings brought against a lawyer for criticizing a judge. Underlying that issue is the question of how First Amendment interests in permitting lawyers to speak freely about matters peculiarly within their knowledge, and permitting the public to hear such speech,[10] should be accommodated with state interests in protecting the reputations of courts and judges.

This Court never has directly addressed the applicability of *New York Times Co. v. Sullivan* in lawyer disciplinary proceedings. The Court has considered whether the *New York Times* rule applies to lawyer criticism of judges in the context of a criminal libel prosecution, and held that it does. *Garrison v. State of Louisiana, supra.* In *Gentile v. State Bar of Nevada*, the Court addressed the extent to which the First Amendment bars professional discipline of a lawyer for making extra-judicial comments which pose a danger of materially prejudicing a pending adjudicative proceeding. Unresolved, however, is how the First Amendment applies in lawyer disciplinary proceedings where the crux of the charge is criticism of a judge or a judge's opinion and there is no issue of the criticism materially prejudicing a pending adjudicative proceeding.

As the Missouri Supreme Court expressly acknowledged below, its adoption of what is, in effect, an objective negligence standard for the "reckless disregard" component of "actual

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[10] The First Amendment interests at stake here are not only the rights of lawyers to speak freely, but also the rights of the public to hear what lawyers have to say. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

malice" in lawyer disciplinary proceedings conflicts with decisions of other state supreme courts addressing the same issue. App. 14. At least three other state supreme courts have endorsed the applicability of the traditional *New York Times* subjective standard for actual malice in determining whether critical comments made by a lawyer about a judge are entitled to First Amendment protection in professional disciplinary proceedings.

In *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W.Va. 1988), the West Virginia Supreme Court reviewed disciplinary charges brought against a lawyer based on public statements that he had made against two judges that were allegedly "prejudicial to the administration of justice." 332 S.W.2d at 326, quoting DR 1-102(A)(5). The court concluded that "most criticism of the court system, its procedures, or judges would be a matter of public or community concern and would, therefore, enjoy First Amendment protection under [*Pickering v. Board of Education*, 391 U.S. 563 (1968)]." 370 S.W.2d at 332. The court further held that "the Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges." *Id.* While the state supreme court also acknowledged that such protection is "not absolute," and did not apply to defamatory statements, the court concluded, unlike the Missouri court here, that the scope of that exception in lawyer disciplinary proceedings is defined by "the defamation standard for public officials found in *Sullivan v. New York Times*." *Id.*[11] *See also Committee on Legal Ethics v. Farber*, No. 19909 (W. Va. June 27, 1991), 1991 WL 113077.

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[11] Because the disciplinary proceedings under review in *Douglas* had failed to consider "whether the [lawyer's] speech exceeded the scope of [First Amendment] protection," the supreme court remanded for such an inquiry. 370 S.W.2d at 326.

In *State ex rel. Oklahoma Bar Association v. Porter*, 766 P.2d 958 (Okla. 1988), the Oklahoma Supreme Court declined to discipline an attorney for criticizing a federal judge. The court concluded that "[i]n keeping with the high trust placed in this Court by the people, we cannot shield the judiciary from the critique of that portion of the public most perfectly situated to advance knowledgeable criticism, while at the same time subjecting the balance of government officials to the stringent requirements of the *New York Times Co. v. Sullivan, supra*, and its progeny." 766 P.2d at 969. Consistent with *New York Times*, the court construed the state disciplinary rule as not reaching a lawyer's criticism of a judge where "no evidence was introduced to demonstrate that the statements were false or that they were *insincerely* uttered by a speaker having no basis upon which to found them." 766 P.2d at 968 (emphasis added).[12]

In *Ramirez v. State Bar of California*, 28 Cal. 3d 402, 169 Cal. Rptr. 206, 619 P.2d 399 (1980), the California Supreme Court employed reasoning which also is inconsistent with the Missouri Supreme Court's ruling in this case. The court, in *Ramirez*, ultimately ordered that the lawyer charged with misconduct be

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[12] On the other hand, there is also language in *Porter* that might be read as rejecting *New York Times*' applicability. *See, e.g.*, 766 P.2d at 969 ("There is no First Amendment protection for false statements of fact."). Because, however, the court's ruling in *Porter* appears ultimately to turn on the court's determination that the respondent subjectively believed that he had a rational basis for concluding that his remarks were well grounded, the decision is best read as consistent with *New York Times*. The Tennessee Supreme Court appears to agree, having recently referred to the Oklahoma Supreme Court's statement in *Porter* regarding the applicability of *New York Times* in support of the Tennessee court's own conclusion that the First Amendment precluded disciplining a district attorney for critical comments he had made regarding a judge. *See Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn.), *cert. denied*, 110 S. Ct. 278 (1989).

disciplined based on derogatory statements that he made against several judges,[13] but reached that result only after carefully considering whether those comments were entitled to First Amendment protection. 28 Cal. 3d at 402, 169 Cal. Rptr. at 211, 619 P.2d at 404. In considering the First Amendment issue, the court followed this Court's analysis in *Garrison v. State of Louisiana,* which applied the *New York Times Co. v. Sullivan* subjective standard to a criminal libel conviction against an attorney based on his characterization of local judges as lazy and incompetent.[14]

The extent of state court conflict concerning the applicability of *New York Times Co. v. Sullivan* in professional disciplinary proceedings is not confinued to the opinions in this case, *In re Disciplinary Action Against Graham, Douglas, Ramirez* and *Porter.* The New York Court of Appeals recently held that "there must be an objective standard, of what a reasonable attorney would do in similar circumstances," citing *Louisiana State Bar Association v. Karst,* 428 So.2d 406, 409 (La. 1983), and that "[i]t is the reasonableness of the belief, not the state of mind of the attorney, that is determinative." *In the Matter of Holtzman,* 78 N.Y.2d 184, 193 (1991), *petition for cert. filed*

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[13] The lawyer's speech in *Ramirez*, unlike the speech at issue in this case, accused several judges of unlawful behavior, including an allegation that the judges "had been induced to act in an unlawful manner by [the opposing party's] 'power, influence, and money.' " 28 Cal. 3d at 409, 169 Cal. Rptr. at 209, 619 P.2d at 402. In this case, the Missouri Supreme Court expressly found that Westfall "did not accuse the judge of criminal conduct or of being subject to inappropriate influence." App. 17.

[14] At least two other lower courts have also given some indication that the *New York Times* subjective standard applies in determining whether a lawyer's criticism of a judge is entitled to First Amendment protection in professional disciplinary proceedings. *Eisenberg v. Boardman*, 302 F. Supp. 1360 (W.D. Wisc. 1969); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974), *writ ref'd n.r.e.*

September 9, 1991. Other state supreme courts appear to have limited even further the reach of *New York Times Co. v. Sullivan* in lawyer disciplinary proceedings, concluding that the First Amendment offers little or no protection against a lawyer being disciplined for criticizing a judge if such criticism runs afoul of professional ethics rules. *See, e.g.,Committee on Professional Ethics and Conduct v. Hurd,* 360 N.W.2d 96, 105 (Iowa 1984) ("a lawyer's right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct"); *State v. Nelson,* 210 Kan. 637, 640, 504 P.2d 211, 215 (1972) ("the *New York Times* case and the supporting line of cases cited by respondent in his brief, are clearly inapplicable to a disciplinary proceeding"). *See also In the Matter of Lacey,* 283 N.W.2d 250 (S.D. 1979); *In re Shimek,* 284 So.2d 686 (Fla. 1973).[15]

The frequency with which the issue has recurred underscores the need for this Court to address and resolve it. Practical considerations also highlight the need for definitive guidance from this Court. In light of the present uncertainty and conflict among state supreme courts, whether a particular lawyer is disciplined for criticizing a judge or a judicial opinion now

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[15] In addition to the cases cited above, *see Polk v. State Bar of Texas,* 374 F. Supp. 784 (N.D. Tex. 1974); *In the Matter of Terry,* 394 N.E.2d 94 (Ind. 1979), *cert. denied,* 444 U.S. 1077 (1980); *In the Matter of Frerichs,* 238 N.W.2d 764 (Iowa 1976); *In the Matter of Johnson,* 240 Kan. 334, 729 P.2d 1175 (1986); *J.C.J.D. v. R.J.C.R.,* 803 S.W.2d 953 (Ky. 1991); *Kentucky Bar Ass'n v. Heleringer,* 602 S.W.2d 165 (Ky. 1980); *State ex rel. Nebraska State Bar Association v. Michaelis,* 210 Neb. 545, 316 N.W.2d 46, *cert. denied,* 459 U.S. 804 (1982); *In the Matter of Raggio,* 87 Nev. 369, 487 P.2d 499 (1971); *In re Hinds,* 90 N.J. 604, 449 A.2d 483 (1982); *In re Donohoe,* 90 Wash. 2d 173, 580 P.2d 1093 (1978). *See generally,* Annotation, "Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action," 12 ALR 3d 1408 (1967 & Supp.); Hoye, "Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys." 38 DRAKE LAW REV. 31 (1988-89).

depends on the happenstance of the state by which the lawyer was licensed to practice law. A lawyer subjected to disciplinary proceedings in either Minnesota or Missouri would currently receive far less First Amendment protection for critical statements made about a judge than would a lawyer in several other states, including West Virginia, Oklahoma, and California.[16] Given that lawyers commonly work for multi-state law firms and legal disputes are frequently national in scope, the practical problems presented by the current confusion in the state courts are not imaginary. They are immediate and substantial.

This case provides an excellent vehicle for addressing and resolving the issues posited above. The Missouri ethics rules involved in this case are identical to the American Bar Association's Model Rules of Professional Conduct and, therefore, are the same as or similar to the ethics rules of most other states. Moreover, there is no real dispute as to any of the material facts of the case. Accordingly, this case squarely and sharply frames the constitutional questions presented.

2. The Decision Below Conflicts with *New York Times Co. v. Sullivan* and its Progeny.

a. The Missouri Supreme Court's refusal to apply the *New York Times Co. v. Sullivan* subjective standard for "actual malice" is incorrect as a matter of law. In *New York Times*, this Court concluded that the First Amendment requires "a federal rule that prohibits a public official from recovering damages for

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[16] Indeed, the level of First Amendment protection that a lawyer would receive would not even depend on the locale in which the statement was made or the location of the judge who was criticized. A lawyer licensed to practice law in Missouri who made a critical remark in West Virginia about a judge in Oklahoma would presumably be subjected to Missouri's diminished First Amendment protection in a disciplinary proceeding brought in that state.

a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" 376 U.S. at 279. According to the Court, "actual malice" means "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. A mere "finding of negligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Id.* at 288.

In *Garrison v. State of Louisiana, supra*, this Court applied the *New York Times* requirement of a showing of "actual malice" to overturn a criminal prosecution of a district attorney for libel. The district attorney had attributed a large backlog of pending criminal cases to the "inefficiency, laziness, and excessive vacations of the judges." 379 U.S. at 66. The district attorney had further claimed that the judges' refusal to authorize disbursements for his investigations had hindered his law enforcement efforts. This Court concluded that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." 379 U.S. at 74. The Court, moreover, specifically found that "[t]he reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. . . [D]efeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." *Id.* at 79.

As more recently confirmed by this Court, the "reckless disregard" standard is a "subjective one." *Hart-Hanks Communications, Inc. v. Connaughton,* 109 S.Ct. 2678, 2696 (1989). Unlike the test announced by the Missouri Supreme Court in this case, it "requires more than a departure from reasonably prudent conduct." *Id.* "[T]here must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity'." *Id.*, quoting *Garrison*, 379 U.S. at 74.

b. The same considerations that led to the application of the subjective "actual malice" standard in *New York Times* and *Garrison* apply with equal force here. The speech at issue here, like that in *New York Times* and *Garrison*, was critical of the actions of a public official and concerned a matter of substantial public concern. "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile v. State Bar of Nevada*, 111 S.Ct. at 2724 (Opinion of Kennedy, J.); *see Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978). Thus, the kind of speech at issue here "lies at the very center of the First Amendment." *Gentile*, 111 S.Ct. at 2724 (Opinion of Kennedy, J.). The Missouri Supreme Court's decision in this case creates the very danger that this Court sought to avoid in *New York Times*: "the possibility that a good-faith critic of government will be penalized for his criticism." 376 U.S. at 292.

Neither the nature of a lawyer disciplinary proceeding nor the needs of the judiciary justify a different rule than that adopted in *New York Times* and applied in *Garrison*. The adverse consequences that a lawyer can suffer in disciplinary proceedings — ranging from reprimand to disbarment — are no less onerous than those flowing from civil or criminal proceedings. As stated by Chief Justice Blackmar in his dissent below, "[p]rofessional discipline can be fully as chilling of expression as can criminal prosecution." App. 31-32.

Judges, moreover, "are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 (1947). "Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation." *New York Times*, 376 U.S. at 273. As the court below acknowledged, "[t]he principle that 'debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement,

caustic, and sometimes unpleasantly sharp attacks on government and public officials' is no less important when the judiciary is involved." App. 11, quoting *Garrison*, 379 U.S. at 75, quoting *New York Times*, 376 U.S. at 270.[17]

Contrary to the Missouri Supreme Court's apparent assumption, stifling criticism of judges is not likely to enhance public respect for the judiciary. Quite the opposite is true. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion." *Landmark Communications, Inc.*, 435 U.S. at 842, quoting *Bridges v. California*, 314 U.S. 252, 270 (1941). The more likely result of such an effort is to "engender resentment, suspicion, and contempt." *Id.*, quoting *Bridges*, 314 U.S. at 271. *See id.*, quoting *Bridges*, 314 U.S. at 291-92 (Frankfurter, J., dissenting) ("speech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed'").

c. In declining to apply the *New York Times* standard in lawyer disciplinary proceedings, the Missouri Supreme Court

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[17] Judges certainly have greater access to channels of effective communication to the public than do private individuals. To be sure, judges may not feel as free as some other public officials to make statements to or through the media, but their power to be heard, and to respond to unfair criticism, remains substantial. They can issue written opinions in cases, which are preserved and widely disseminated in law books and frequently reported on in the popular press. In addition, judges sometimes speak directly to the press in response to criticism. Also, it is not unusual, given the status of the judiciary, for other persons to come to the defense of a judge being criticized. *See, e.g.*, Epstein, *The Prince of the Podium: Reflections on THE BEST DEFENSE*, 1983 WISC. L. REV. 167 (1983) (responding to criticism of federal judge contained in book)

placed undue emphasis on the state's "substantial interest in maintaining public confidence in the administration of justice" and, in particular, the appellate process. App. 12. This interest is weighty, to be sure, but it is no more so than the general need to protect government and its officials from false claims, which already has been taken into account by this Court in fashioning and applying the subjective "actual malice" test in *New York Times* and *Garrison*. *See Landmark Communications, Inc.*, 435 U.S. at 841-42.

Indeed, criticism of the appellate process is hardly the kind of public commentary that warrants diminished First Amendment protection. Westfall's criticism of the court of appeals' August 9, 1988 decision did not address an ongoing adjudicatory proceeding, and thus risk, as in the case of a jury trial, tainting or prejudicing the factfinding process. The object of his criticism was a completed appellate decision. Nor did petitioner's criticism occur in the courtroom itself, where a court undoubtedly possesses heightened authority to regulate the conduct and speech of lawyers before it for the maintenance of proper decorum. Westfall's speech occurred in his own office and was broadcast across the public airwaves. As an elected public official, Westfall had a special responsibility to speak with the news media concerning a matter of public concern within his official responsibilities. *See Gentile v. State Bar of Nevada*, 111 S.Ct. at 2735 (Opinion of Kennedy, J.) (lawyers "hold unique qualifications" and "'are a crucial source of information and opinion,'" quoting *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975)).

d. Contrary to the majority opinion below, nothing in *New York Times* or *Garrison*, or in any other of this Court's precedents, supports the view that the less demanding "reasonable lawyer" test should apply to the kind of lawyer disciplinary proceeding at issue in this case. Virtually all of the cases upon which the Missouri Supreme Court relied were decided before

this Court's decision in *New York Times*. None of those cases, moreover, involved a lawyer's criticism of an opinion authored by a judge for an appellate court.

For instance, the Missouri Supreme Court relied principally on this Court's decision in *In re Sawyer*, 360 U.S. 622 (1959). App.9. At issue in that case was the propriety of a decision to discipline a lawyer for critical comments she made publicly about a trial judge in an ongoing adjudicatory proceeding in which the lawyer served as defense counsel. A majority of this Court concluded that the lawyer's comments could not properly be viewed as a personal attack on a judge warranting disciplinary action. Although Justice Stewart in a separate concurring opinion questioned the plurality's intimations as to the applicability of the First Amendment to such speech, as did the four dissenting Justices, the plurality's reasoning and Justice Stewart's concurrence prevented the Court from reaching the First Amendment issue.

In re Sawyer not only fails to support the Missouri Supreme Court's decision in this case, it serves to buttress Westfall's position. As Chief Justice Blackmar pointed out in his dissent below, the lawyer's comments in *Sawyer* are "much more disparaging and inflammatory than anything in this case." App. 34.[18] Yet, five Justices readily concluded that the evidence in the record was insufficient to support the charge that the lawyer had impugned the integrity of the judge so as to warrant disciplinary action.

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[18] According to a newspaper article excerpted in the Court's opinion, Sawyer reportedly "spoke of 'some rather shocking and horrible things that go on at the trial.' There's 'no such thing as a fair trial in a Smith act case,' she charged. 'All rules of evidence have to be scrapped or the government can't make a case.' " 360 U.S. at 627 n.4.

Also the comments in *Sawyer* concerned an ongoing adjudicatory proceeding. Here, Westfall criticized a judge's legal reasoning set forth in an opinion filed on behalf of an appellate court. This Court in *Sawyer* explicitly acknowledged that such criticism of a judge's work cannot be deemed to impugn a judge's integrity: "If [the trial judge] was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed." 360 U.S. at 635. Like the lawyer's comments in *Sawyer*, Westfall's criticism cannot be fairly read to say that the judge "was corrupt or venal or stupid or incompetent." *Id.* Nor, contrary to the reasoning of the special master in this case (App. 59-62), can Westfall's comments be so viewed on the theory "that some of the audience would infer improper collusion . . . from a charge of error. Some lay persons may not be able to imagine legal error without venality or collusion, but it will not do to set our standards by their reactions." *Id.*

3. The Decision Below Conflicts With *Milkovich v. Lorain Journal Co.*

The First Amendment also insulates Westfall's comments from sanction, in disciplinary proceedings or otherwise, because they cannot reasonably be viewed as statements of actual fact about an individual that are provable as false. The First Amendment requires that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law." *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2706 (1990). Where "statements . . . cannot 'reasonably [be] interpreted as stating actual facts' about an individual," the First Amendment bars their proscription. *See id.*, quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). As demonstrated below, none of Westfall's remarks regarding the opinion authored by Judge Karohl is either "provable as false" or

can be "reasonably interpreted as stating actual facts about an individual."[19]

(1) "[F]or reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl . . .": As Chief Justice Blackmar pointed out in his dissent, "[e]lementary grammar teaches that what [Westfall] suggested were 'a little bit less than honest' were the reasons, not the judge. . . . The coupling of the offensive phrase with 'illogical' is a further demonstration that the respondent is commenting on the reasons." App. 24. Nor does the mere fact that Westfall referred to the judge by name rather than to the "court" transform his comments into impermissible criticism. As further explained by the dissent below, "[t]his is hardly a significant or substantial distinction, in view of our practice, along with almost all American collegial courts, of speaking through opinions prepared by one member and bearing the author's name." App. 26-27.

(2) "He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes": To say that a judge has "distorted" a statute or used "convoluted logic" does not amount to a personal attack. Such characterizations of another's reasoning are the routine trappings of the adversary process. They do not assert facts that are objectively provable or disprovable, or purport to make a statement of actual facts about an individual. Likewise, there is nothing untoward in stating that a decision is one that the judge "personally likes." Plainly, judges have personal judicial philosophies. "The very considerations which judges most rarely mention . . . are the

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[19] In First Amendment cases, this Court typically does not defer to the lower court's characterization of the defendant's comments, but instead independently examines the whole record to make sure that the lower court's judgment does not improperly impinge upon freedom of expression. *See, e.g., Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2695; *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984).

secret root from which the law draws all of juices of life[:] . . . the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2404 (1991), quoting O. Holmes, THE COMMON LAW 35-36 (1881). A statement such as the one made by Westfall, which merely acknowledges that basic fact, falls far short of an accusation of corrupt or improper judicial behavior.

(3) "Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.": The thrust of this remark, at worst, was that the decision was result-oriented. It is no more damning than Westfall's statement that the decision was one that the judge "personally likes." In addition, as Chief Justice Blackmar pointed out (App. 26-27), Westfall's suggestion that the judge "made up his mind before he wrote the decision" reflects a "realistic analysis of the decisional process." Judges routinely decide what the result in a case will be before drafting the court's opinion. Moreover, where, as in this case, the appellate tribunal previously had taken the extraordinary step of issuing a preliminary writ of prohibition, Westfall's assumption that the court had been predisposed against the prosecution's position in subsequently deciding whether to make that writ permanent likely was an accurate assessment. In any event, such an assessment is not tantamount to accusing a judge of corrupt or improper judicial conduct.

That Westfall might have chosen his words more carefully or used milder language does not remove his remarks from the full protection of the First Amendment. As this Court recently noted in *Milkovich v. Lorain Journal*, 110 S.Ct. at 2706, the *New York Times* culpability requirements are intended to ensure "that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much

to the discourse of our Nation" (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988)). In fact, the use of loose, figurative or hyperbolic language tends to negate any impression that the speaker's message is the literal meaning of his words. *See, e.g., Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970) (liability cannot be predicated on notion that word "blackmail" implied that developer committed actual crime); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (the word "traitor" in literary definition of union "scab" does not support defamation action under federal labor law).

By his remarks, Westfall "merely indulged in a practice familiar in the long history of Anglo-American litigation, where unsuccessful litigants and lawyers give vent to their disappointment in tavern or press." *United States v. Morgan*, 313 U.S. 409, 421 (1941). Moreover, lawyers, legislators, law professors, judges, public officials and candidates for public office routinely make such negative statements about viewpoints with which they disagree without being hauled up on ethics charges.[20]

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[20] *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193, 222 (1979) (dissenting opinion of Rehnquist, J.) ("Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history and uniform precedent . . . ."); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3067 (1989) (opinion of Blackmun, J. concurring in part and dissenting in part) ("Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions. Nor in my memory has a plurality gone about its business in such a deceptive fashion.") A broader set of illustrations drawn from judicial opinions, scholarly works and the press, quoting judges, academics and other lawyers, is set forth in the Appendix to this petition at pp. 104-10.

In its misguided effort to insulate judges from public criticism, the Missouri Supreme Court threatens to chill this important and traditional kind of political speech, which is essential for public oversight of the judicial process. "[T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings might wish to make changes in the system." *Gentile v. State Bar of Nevada*, 111 S.Ct. at 2742. Moreover, characterizations of opponents' arguments or disappointing court rulings as "illogical," "convoluted," or even "dishonest" inject an emotional spark into the adversary process. Under the Missouri court's ruling, the passion of the advocate for a particular position would be replaced by a false deference to authority which would deprive the adversarial system of its emotional force.

Finally, it is no mere coincidence that this case involves a public prosecutor. Like many judges,[21] public prosecutors typically are elected officials. As such, like the petitioner in this case, they often are expected to speak out on matters of public concern within the sphere of their official responsibilities. The significance and correctness of a court decision in a widely-publicized case handled by a prosecutor's office certainly are appropriate matters for comment. Thus, public prosecutors are

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[21] In Missouri, appellate judges are appointed by the Governor and periodically stand for retention elections. Moreover, most Missouri trial judges are elected through partisan elections. This elective attribute of the judicial office makes it particularly important to encourage free debate about judges' conduct of their offices.

especially at risk as a result of the Missouri Supreme Court's decision.[22]

4. *Gentile v. State Bar of Nevada* Weighs in Favor of Granting *Certiorari* and Undertaking Plenary Review.

Finally, this Court's decision in *Gentile v. State Bar of Nevada*, handed down after the Missouri Supreme Court's decision below, supports review in this case.

At issue in *Gentile* was the scope of First Amendment protection due a lawyer subjected to state disciplinary proceedings based on critical comments he made regarding an ongoing adjudicatory proceeding. A majority of the Court concluded that the state's disciplinary action was constitutionally infirm because the underlying court rule was void for vagueness. A different majority of this Court concluded, however, that a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials" permitted a state to restrict speech by a lawyer participating in a pending trial where there is a "substantial likelihood of material prejudice" from that speech. 111 S.Ct. at 2745.

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[22] The implications of this decision are not confined, however, to either elected prosecutors or state and local prosecutors. Federal prosecutors typically are embroiled in local controversies, and state and local judges not infrequently are involved. Were federal prosecutors to be subjected to disciplinary proceedings for critical comments regarding a judge, such proceedings could seriously disrupt the work of those officials. For this reason, the Court may wish to seek the views of the Solicitor General concerning whether *certiorari* is warranted. The Solicitor General participated as *amicus curiae* in *Gentile*, which, like this case, concerned the application of the First Amendment to a state lawyer disciplinary proceeding. At the very least, the Solicitor General's participation in *Gentile* reflects the potential importance to the United States of the First Amendment issues presented by this case.

The Court in *Gentile* carefully confined its reasoning regarding diminished First Amendment protection for lawyers to the special problems presented by speech directed to a pending adjudicative proceeding, and particularly the possible prejudicial impact that such speech could have on the jury's factfinding process. The Court stressed that the rule at issue in that case "imposes only narrow and necessary limitations on lawyer's speech." 111 S.Ct. at 2745. The "two principal evils" at which those limitations were aimed were: "(1) comments that are likely to influence the actual outcome of the trial; and (2) comments that are likely to prejudice the jury venire." *Id.*

In this case, unlike *Gentile*, Westfall's comments were not directed at a pending adjudicative proceeding. Neither of the potential evils articulated in *Gentile* is implicated where, as here, the lawyer's critical comments address a completed appellate court ruling. In these circumstances, there is no risk of taint to a factfinding process.[23] Westfall's comments are akin to those that would occur following completion of a trial, which this Court in *Gentile* made clear would not be affected by its ruling in that case. *See* 111 S.Ct. at 2745 ("it merely postpones the attorney's comments until after the trial"); *see also id.* at 2742, quoting *Patterson v. Colorado*, 205 U.S. 454, 463 (1907) ("'[w]hen a case is finished, courts are subject to the same criticism as other people . . .'").

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[23] The special master argued that comments by Westfall criticizing the jury's verdict in the original Bulloch murder trial could have been prejudicial to the administration of justice by, for example, intimidating jurors and judges in future criminal cases into convicting criminal defendants in order to avoid public criticism by prosecutors. App. 84-90. However, in addition to the other flaws in this argument, the comments addressed by the special master in this context are not the comments for which Westfall was charged with professional misconduct under Missouri Rules of Professional Conduct 8.2 and 8.4, were expressly not considered by the Missouri Supreme Court and, therefore, are not the subject of this case. *See* note 8, *supra*.

For these reasons, *Gentile* supports Westfall's position in this case. The Court in *Gentile* concluded, in effect, that a lawyer's free speech rights in the context of out-of-court statements relating to a pending case may be restricted only if the speech poses "substantial likelihood of material prejudice" to an ongoing adjudicative proceeding. The Missouri Supreme Court, however, made no such finding in this case.[24] Nor could it have. Westfall's comments did not pertain to a pending adjudicatory proceeding at all. They concerned a completed appellate court ruling.

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[24] The Missouri Supreme Court concluded, without elaboration, that "[r]espondent's conduct was prejudicial to the administration of justice . . . ." App. 17. However, this conclusion is not tantamount to the type of finding required under *Gentile* before restriction of a lawyer's First Amendment rights may be justified. This is evident not only from the absence of any discussion in the Missouri court's opinion of the possibility of such prejudice, but also from the court's limited discussion of the charges under Rule 8.4(d), which proscribes "conduct that is prejudicial to the administration of justice." After devoting virtually all of its opinion to the allegations pertaining to a violation of Rule 8.2(a), the court's sole reference to Rule 8.4 was that "[t]he charges brought under Rule 8.4 are encompassed within the violation of Rule 8.2(a) in this case and, for purposes of imposition of discipline, cannot be distinguished." App. 18.

CONCLUSION

The petition for a writ of *certiorari* should be granted for this Court's plenary review.[25]

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[25] Because the Court's intervening decision in *Gentile* does not directly address the distinct First Amendment issues presented in this case, the Court need not provide the Missouri Supreme Court with an opportunity to reconsider its decision in this case in light of *Gentile* prior to granting plenary review. Should, however, the Court disagree, we alternatively request that the Court grant this petition, vacate the judgment of the Missouri Supreme Court below, and remand for that court's reconsideration in light of *Gentile*.